

**RULES
OF
THE TENNESSEE HEALTH SERVICES AND DEVELOPMENT AGENCY**

**CHAPTER 0720—6
RULES OF PROCEDURE FOR HEARING CONTESTED CASES**

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0720—6—.01 GENERAL PROCEDURES FOR CONTESTED CASES

- (1) Except as otherwise provided herein, all contested cases before the Agency will be conducted in accordance with T.C.A. §§ 4—5—301 et seq., 68—11—1610, with these Rules, and with the Rules of the Secretary of State Chapter 1360—4—1.
- (2) Eligibility to appeal. Any person with legal standing, and who meets the requirements of T.C.A. §68-11—1610 may petition the Agency for a contested case hearing ~~regarding~~ to appeal¹ the grant or denial of a certificate of need.
- (3) Filing of petitions. Petitions for contested case hearings must be filed with the Agency in triplicate pursuant to the Rule 0720-1-.01 of the Health Services and Development Agency,² and must be received at the Agency offices within ~~thirty (30)~~ fifteen (15)³ days of the date of the Agency's meeting at which the action which is the subject of the petition took place. Simultaneous with filing, the petitioner shall serve copies of the petition on all other parties in the matter. The petitioner shall have the burden of proving, by a preponderance of the evidence, that a certificate of need should be granted or should be denied.^{4 5}
- (4) Intervention. Any person with legal standing and who meets the requirements of T.C.A. §4—5—310 may file petition for intervention in a contested case, within the time limit set forth in T.C.A. § 68-11-1610~~within the time limit set forth in T.C.A. §68—11—1610.~~⁶

Authority: T.C.A. §§68—11—1605; 68—11—1610; 4—5—223; 4—5—310; 4—5—314; 4—5—202.

0720—6—.02 CONTESTED CASES BEFORE ADMINISTRATE JUDGES SITTING ALONE

- (1) With the exception of declaratory orders referenced below, all petitions for a contested case hearing shall routinely be referred to the Administrative Procedures Division, Department of State for hearing by an Administrative Judge sitting alone on behalf of the Agency. The Agency retains the right, however, to hear any particular contested case on its own behalf.
- (2) In all cases, whether heard by an Administrative Judge sitting alone, or by the full Agency, the petitioner and other parties with the exception of the Agency shall bear the cost for all court reporters and transcriptions. The original transcript and one copy of the transcript for each member of the Agency shall be provided to the Agency by the other parties, if the case is to be reviewed by the full Agency. Other costs of the proceeding, including the Administrative Judge's costs shall be assessed by the Agency in accordance with T.C.A §68—11—1610.
- (3) Unless agreed otherwise by the parties, at the beginning of all contested case hearings, Agency counsel shall provide a summary of what the case is about, description of the project, and introduce into evidence the application, the reviewing agency's report and the Staff Summary, and the minutes of the Agency

reflecting the action that was taken before the Agency. In no event shall this provision mean that the Agency is a neutral party in contested cases, or that its counsel represents the interests of any party other than the Agency.⁷

- (4) In all cases, whether heard by an Administrative Judge sitting alone, or by the full Agency, the party petitioning for such hearing shall present its case first, unless the parties agree otherwise.⁸

Authority: T.C.A. §§68—11—1605; 68—11—1610; 4—5—223; 4—5—310; 4—5—314; 4-5—202.

0720—6—.03 REVIEW OF INITIAL ORDERS

- (1) An Initial Order issued by an Administrative Judge, sitting alone, may be reviewed by the Agency pursuant to ~~the Administrative Procedures Act~~ T.C.A. §§4-5-301, et seq., 68-11-1610, with these Rules, and with the Rules of the Secretary of State Chapter 1360-4-1. The Agency may, in its discretion, decline to exercise any review of an Initial Order issued by an Administrative Judge,⁹ in which event the Initial Order issued by an Administrative Judge shall become a Final Order as provided by the Administrative Procedures Act.¹⁰
- (2) In such a review proceeding, the Agency's review is strictly limited to the record which was developed before the Administrative Judge. No additional evidence is to be received or considered by the Agency.
- (3) Such a review proceeding is in the nature of appellate review. Each party will be given the opportunity to file a brief which should specify what action the party maintains the Agency should take on the Initial Order. The Agency may place reasonable page limitations on such briefs.
- (4) In such a review proceeding, each party will normally be limited to oral argument of thirty (30) minutes in length, including rebuttal.
- (5) At the conclusion of the review proceeding the Agency may decide that the Initial Order should be adopted in its entirety, or it may make such modifications to the Initial Order as it deems appropriate.
- (a) Alternatively, the Agency may take the matter under advisement, and subsequently reconvene, after reasonable notice to the parties, to hold its public deliberations and to render a Final Order.

Authority: T.C.A. §§68—11—1605; 68—11—1610; 4—5—223; 4—5—310; 4—5—314; 4—5—202.

0720—6—.04 DECLARATORY ORDERS

- (1) Any affected person may petition the Agency for a declaratory order, as provided in T.C.A. §4—5—223, as to the interpretation, validity, or applicability of a statute or rule within the primary jurisdiction of the Agency. Such petition shall be filed with the Agency in triplicate, and must specifically identify the statute or rule at issue, and the nature of the ruling sought
- (2) A petition for declaratory order is viewed as primarily involving questions of law and statutory or rule interpretation. The parties should strive to limit the amount of evidence presented, and to stipulate the facts to the extent possible.
- (3) In the event the petition for declaratory order arises out of the Agency's action on a specific project or issue, the petition for declaratory order shall be filed within thirty (30) days of the date of the Agency meeting at which the action at issue was taken.
- (4) No person may file a petition for declaratory order as to any action or issue which is the subject of a pending or completed contested case proceeding involving the same person.

Authority: T.C.A. §§68—11—1605; 68—11—1610; 4—5—223; 4—5—310; 4—5—314; 4-5—202.

¹ Agency Staff proposed the amendment to add clarity.

² Agency Staff proposed the amendment because parties attempting to appeal a decision by the Agency might not read beyond 0720-6, so it may be helpful to direct parties to the Agency's Rule regarding communication to the Agency generally.

³ Agency Staff proposed the amendment to reflect the new statutory time for appeal.

⁴ Dan H. Elrod, Esq. of Miller & Martin has suggested that language be added clarifying the burden of proof in appeals of Agency decisions. Such would not change the burden of proof. Agency Staff agrees.

⁵ See E. Graham Baker, Esq. of Weeks, Anderson and Baker's suggestion in footnote 8, below.

⁶ Jerry W. Taylor, Esq. of Farris Mathew Branan Bobango & Hellen made the following suggestion:

Subsection (4) requires that any person filing a petition to intervene in a contested case must do so "within the time limit set forth in T.C.A. § 68-11-1610." This is the fifteen-day time limit for filing the petition for a contested case. This fifteen-day filing limitation in the CON statute expressly applies only to a petition for a contested case hearing; no mention is made of a petition to intervene.

There are two problems with this rule as it is now written: First, until such time as the petition for contested case is filed, there is no contested case in which to intervene. If the original petitioner waits until the very last minute to file its petition for contested case, the party which wishes to intervene does not know whether there will be a contested case in which to intervene, and as a practical matter has no opportunity to intervene. Second, the fifteen-day limitation on a petition to intervene appears to be inconsistent with the provisions in the Administrative Procedures Act, § 4-5-310, which allows a petition for intervention in a contested case to be filed at any time up to seven days before the hearing, subject to the approval of the Administrative Judge. For these reasons, I would suggest deleting from the Rule the clause "within the time limit set forth in T.C.A. § 68-11-1610."

⁷ Dan H. Elrod, Esq. of Miller & Martin has suggested that language be added to the Agency's Rules providing that at the beginning of a contested case Agency counsel would provide a summary of what the case is about, description of the project, and introduce into evidence the application, the reviewing agency's report and the Staff Summary, and the minutes of the Agency reflecting the action that was taken before the Agency, to lay a foundation for the Administrative Judge as to what the case is about.

Jerry W. Taylor, Esq. of Farris Mathew Branan Bobango & Hellen added the following: "I would concur with the suggestion of another commenter that the Agency's counsel provide a summary of the case, and lay out a basic evidentiary foundation for a case at the outset of the hearing. Regardless of who has the burden of proof and the burden of going forward, this procedure would seem to be beneficial to all parties involved. "

⁸ Dan H. Elrod, Esq. of Miller & Martin has suggested that language be added to the Agency's Rules directing that the petitioner has the burden of going forward in contested cases, i.e., to present its case-in-chief first. Such would not change the rule, but may clarify it.

E. Graham Baker, Esq. of Weeks, Anderson and Baker suggested the following, which is contrary to Mr. Elrod's suggestion:

I suggest you add a sentence that the original applicant has the burden of proceeding during a contested case hearing. It is completely understandable that the petitioner has the burden of proof. However, if the petitioner has petitioned for a contested case for an application that has been approved by the Agency, the petitioner will be forced to prove a negative – that something that is not even on the record (as the original applicant didn't have the burden of proceeding) should not have been approved. No one can provide data negating the need, etc. for an application unless the original applicant has already put that issue in the record. If such a petitioner is saddled with the burden of proceeding, petitioner will have to prove a negative – which is impossible.

I believe one of the ALJs has already ruled in that regard – that the Petitioner has the burden of proof, but the original applicant has the burden of proceeding in the case, as the data regarding the application has to be put on the record prior to a Petitioner attempting to prove it isn't needed, etc.

⁹ Agency Staff proposed the amendment because the Administrative Procedures Act ["APA"], which provides for review by the Agency of Initial Orders in contested case proceedings, provides that the Agency may elect to not hear such an appeal, at its discretion, *if* the Agency's Rules provide for such. The proposed amendment is intended to give the Agency such discretion.

¹⁰ Commissioner Flowers questioned whether "we need to clarify that if the Agency declines to exercise review of an Initial Order that the Initial Order then becomes final?" Such is already provided in the Tennessee Uniform Administrative Procedures Act at T.C.A. §4-5-314. The Agency decided to restate such in the rule for clarity.